Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1644

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES HUGH BROWN,

Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the District Court of Appeal, First District, State of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON, SCHINDLER & TRIPP, P.A.
1492 South Miami Avenue
Miami, Florida 33130
Tel: (305) 358-8611
Attorneys for Respondent

BY: Theodore L. Tripp, Jr.

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Introduction 1

Summary of Argument 2

Argument 3

The State District Court of Appeal correctly applied the case of *Payton v. New York* in its consideration of this cause on remand from the United States Supreme Court.

A. *Payton v. New York* does not fall within those categories of cases which may be given prospective application only 3

B. *Payton v. New York* has already been applied in other state and federal cases and has received the attention of this Court on the very issue of retrospective application 7

C. A decision from this Court to allow consideration of the issue of the retroactivity of *Payton* as it applies to this case would effect a grave injustice not in accord with prior case law in similar circumstances 10

Conclusion 15

TABLE OF AUTHORITIES

Case	Page
Almeida-Sanchez v. United States, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973)	11
Arkansas v. Haynes, Case No. 80-691 (filed October 24, 1980)	9
Beckwith v. United States, 425 U.S. 341, 48 L.Ed.2d 1, 96 S.Ct. 1612 (1976)	12
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)	11
Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971)	3
Haynes v. State, 602 S.W.2d 599 (Ark. 1980)	9
Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 649, 94 S.Ct. 2750 (1974)	12
Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966)	12
Michigan v. Payne, 412 U.S. 47, 36 L.Ed.2d 736, 93 S.Ct. 1966 (1973)	12

TABLE OF AUTHORITIES (Continued)

Case	Page
Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)	*Passim*
Riddick v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)	9, 10
Robinson v. Neal, 409 U.S. 505, 35 L.Ed.2d 29, 93 S.Ct. 876 (1973)	12
United States v. Acevedo, 627 F.2d 68 (7th Cir. 1980)	7, 8
United States v. Fitzgerald, 545 F.2d 578 (7th Cir. 1976)	12-14
United States v. Peltier, 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313 (1975)	11
United States v. Velasquez, 626 F.2d 314 (3rd Cir. 1980)	8
Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980)	11
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980)	8
Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980)	8

TABLE OF AUTHORITIES (Continued)

Case	Page
Williams v. State, 401 U.S. 646, 29 L.Ed.2d 388, 91 S.Ct. 1148 (1971)	12
MISCELLANEOUS	
Annot., Prospective or Retroactive Operation of Overruling Decision, 10 ALR 3rd 1371	4
Stern & Gressman, Supreme Court Practice, §5.12 (1978)	14

INTRODUCTION

Respondent accepts Petitioner's identification of Questions Presented for Review and presentation of the Statement of the Case.

SUMMARY OF ARGUMENT

The action taken by the District Court of Appeal of Florida, Third District, in applying the case of *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), on remand from the United States Supreme Court was eminently correct. The issue raised by Petitioner in its Petition for Writ of Certiorari is totally inapplicable to the facts of this case in light of *Payton*.

The *Payton* decision is outside the ambit of those categories of cases which may appropriately be given prospective application only. While *Payton* undeniably established a new principle of law, it neither overruled past precedent nor decided an issue of first impression whose resolution was not clearly foreshadowed. A review of the decision itself satisfactorily supports this contention.

The law is clear that, in the absence of a Supreme Court holding to the contrary, intervening decisions shall be given retrospective application and not limited to prospective application only. *Payton* has in fact already been applied in several cases at both the state and federal level. Indeed, this Court in December 1980 denied a petition for writ of certiorari on the precise question of whether the Arkansas Supreme Court erred in applying *Payton* to a case on direct review at the time of *Payton's* rendition.

Inasmuch as *Payton* was not applied retroactively or, if applied retroactively, was appropriately applied, this Court should deny the requested writ and allow the cause to proceed in accordance with the ruling of the district court.

ARGUMENT

THE STATE DISTRICT COURT OF APPEAL CORRECTLY APPLIED THE CASE OF *PAYTON V. NEW YORK* IN ITS CONSIDERATION OF THIS CAUSE ON REMAND FROM THE UNITED STATES SUPREME COURT.

A. *Payton v. New York* does not fall within those categories of cases which may be given prospective application only.

Had Petitioner's thoughtful and persuasive argument been presented to this Court in a different case, the argument and remedy sought might well have been appropriate and successful. Based upon the procedural facts herein, however, as well as existing case law, Petitioner's argument is without merit and provides no basis for issuance of the requested writ.

The issue of retrospective application arises only when the intervening decision by this Court establishes a new principle of law "either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). The intervening decision which is applicable in this cause, *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), was none of these. As evidenced by the language of the decision itself, it did not establish a new principle of law either by overruling clear past precedent or by deciding an

issue of first impression whose resolution was not clearly foreshadowed.[1]

Without question, *Payton* established a new principle of law: the Fourth Amendment prohibits police from making warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest in the absence of exigent circumstances. What remains to be determined, before deciding whether *Payton* should be prospectively applied only, is whether the decision as announced by this Court overruled clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed.

It is evident from a review of the case that *Payton* did not overrule any past precedent, clear or otherwise. As initially noted by Mr. Justice Stevens, writing for the majority, there was no clear precedent governing this issue:

> *The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions.* In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled question . . . whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." 423 U.S., at 418, n. 6, 96 S.Ct., at 85, n. 6. [Footnote omitted.]

---

[1] *See generally* Annot., *Prospective or Retroactive Operation of Overruling Decision*, 10 ALR 3rd 1371.

100 S.Ct. at 1374 (emphasis added).

As to the second alternative requirement — whether the case decided an issue of first impression whose resolution was not clearly foreshadowed — it is indeed apparent that *Payton* decided an issue of first impression. The decision itself nevertheless makes clear that its resolution was also "clearly foreshadowed."

In his extensive historical analysis of Fourth Amendment law, Justice Stevens stated that it was "a 'basic principle of Fourth Amendment law' that *searches and seizures inside a home without a warrant are presumptively unreasonable.*" 100 S.Ct. at 1380 (footnote omitted; emphasis added). He further noted that, of the seven United States Courts of Appeal that have considered the issue of warrantless arrests in the home, five have expressed the opinion that such arrests are unconstitutional. *Id.*

Further evidence of the fact that the decision in *Payton* was clearly foreshadowed is given in the Court's analysis of states' decisions on the issue:

> But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1 *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to

> be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra.* Three state courts have relied on Fourth Amendment grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds. A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question. Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of constitutional challenge.

Id. at 1387 (footnotes omitted).

Justice Stevens throughout the opinion quoted extensively from other justices and judges in support of the rationale underlying *Payton* — that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home and justify the same level of constitutional protection. He noted:

> This reasoning has been followed in other circuits. [Footnote omitted.] Thus, the Second Circuit recently summarized its position:
>
> > "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without warrant, at least in the absence of exigent circumstances, even when it is accomplished under

> statutory authority and when probable cause is clearly present." *United States v. Reed*, 572 F.2d 412, 423 (CA2 1978), cert. denied, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259.
>
> *We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.*

Id. at 1381 (emphasis added).

The rationale of *Payton*, therefore, is undeniably apparent: the decision flows from previous decisions of the Court itself, and merely established as the law of the United States the very law which the majority of state and federal courts have been following for several years. As such, it is not an intervening decision which established a new principle of law that either overruled past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed. The questions raised by Petitioner as to the alleged retrospective application of *Payton* to the case sub judice are accordingly inapposite to the court's action below.

B. *Payton v. New York* has already been applied in other state and federal cases and has received the attention of this Court on the very issue of retrospective application.

Since this Court's decision in *Payton* on April 15, 1980, several United States Courts of Appeal have applied *Payton* in deciding cases pending before them.

In *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980), for example, the Seventh Circuit Court of Appeals considered whether a defendant's arrest, executed after forcible entry into his home without a warrant, was lawful in light of *Payton:*

> On February 23, 1979, agents of the Drug Enforcement Administration forcibly entered Bernardino Acevedo's apartment without a warrant and therein arrested him. On April 15, 1980, the United States Supreme Court held violative of the fourth amendment warrantless nonconsensual entries to effect in-home arrests in the absence of exigent circumstances. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Consequently, the issue we face is whether the agents entered Acevedo's apartment under circumstances that may properly be characterized as exigent, that is, requiring immediate action.

Id. at 68-69.

The Court found that exigent circumstances had in fact existed, obviating the need for a warrant in light of *Payton*, and thereby affirmed the conviction below.[2]

Furthermore, the question of the appropriateness of retroactively applying *Payton* has already been presented to the Court in another case in which the

[2]For other examples of application of *Payton* by federal appellate courts, *see United States v. Velasquez*, 626 F.2d 314 (3rd Cir. 1980); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980). *See also Wallace v. King*, 626 F.2d 1157 (4th Cir. 1980).

Court declined to address the issue. In *Arkansas v. Haynes*, Case No. 80-691 (filed October 24, 1980), a case factually similar to the instant one and to *Payton* and *Riddick v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), the Arkansas Supreme Court supressed certain evidence obtained during a warrantless, forcible, and nonconsensual entry into a motel room on the authority of *Payton*. The court specifically stated: "It is obvious that this case [*Payton*] is controlling on the matter before us at this time." *Haynes v. State*, 602 S.W.2d 599, 602 (Ark. 1980). The State then filed a petition for writ of certiorari in this Court, framing the following questions:

> (1) Did Arkansas Supreme Court erroneously interpret and apply *Payton v. New York* in reversing defendant's conviction because of evidence seized pursuant to valid search warrant but after officers made warrantless arrest of defendant in his motel room?
>
> (2) Did Arkansas Supreme Court err in reversing his conviction in light of *Rawlings v. Kentucky*, 48 LW 4885 (1980), which Arkansas court did not consider?

49 U.S.L.W. 3432.

On December 16, 1980, this Court summarily denied the Petition without opinion. 49 U.S.L.W. 3443.

While the *Haynes* case was before this Court for less than two months, the instant case, in contrast, was pending on Petition for Writ of Certiorari for almost

two years.[3] To give no credence to the issue of retrospective application of *Payton* in *Haynes*, while allowing such consideration herein, would work an extreme injustice on Mr. Brown and would be highly inequitable.

Payton is being and has been unquestioningly applied to cases which are already pending on direct review at the time this Court rendered its decision in *Payton*. It would therefore appear that this Court has impliedly sanctioned such application and in fact does not deem it retrospective, as posited in Part A *supra*.

C. A decision from this court to allow consideration of the issue of the retroactivity of *Payton* as it applies to this case would effect a grave injustice not in accord with prior case law in similar circumstances.

At the time of this Court's decision in *Payton*, this cause was pending before the Court on a petition for writ of certiorari on the precise question addressed and answered in *Payton*.[4] With facts remarkably similar to *Payton*, *Brown v. Florida* could well have been the companion case to *Payton* instead of *Riddick v. New York*, *supra*. The only notable difference is that the facts in *Payton* and *Riddick* are more egregious: the

---

[3]Mr. Brown filed his Petition for Writ of Certiorari in this Court on May 18, 1978. The Court's Order granting the Petition and remanding the cause for further consideration in light of *Payton* was issued on April 21, 1980.

[4]At the time the decision in *Payton* was announced, in fact, the instant case had been pending before this Court for approximately two years.

warrantless entry into Brown's home occurred in the middle of the night, as opposed to the daytime entries in *Payton* and *Riddick*, and the felony thought to have occurred involved possession of marijuana with intent to sell, as opposed to murder and armed robbery, respectively.

Mere prospectivity of decisions with respect to constitutional rights should be the exception and not the rule. *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278 (7th Cir. 1980). There could be no retroactive application of *Payton* by the lower court in this cause inasmuch as this case was in the identical procedural posture as *Payton* and had raised before this Court the identical issue of unconstitutionality of warrantless and nonconsensual entries into a suspect's home in the absence of exigent circumstances. Had this case been pending before an appellate court following trial of the matter, then the issue of retroactive application of *Payton* may appropriately have been raised.

In *United States v. Peltier*, 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313 (1975), for example, the case was on appeal to the United States Court of Appeals for the Ninth Circuit at the time this Court announced its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973). Upon the Government's concession that the search and seizure in *Peltier* were unconstitutional under the *Almeida-Sanchez* decision, the Court of Appeals reversed Peltier's judgment of conviction. On certiorari to this court, it was held that the Fourth Amendment exclusionary rule did not require the *Almeida-Sanchez* decision to

be applied retroactively to cases involving searches prior to the date of that decision.[5]

The case of *United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976), is instructive on the issue of retroactive application. In considering whether the decision of *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), should be applied in a case which was on appeal at the time the *Beckwith* decision was rendered, the Seventh Circuit Court of Appeals noted:

> The petition for rehearing points out that the Supreme Court has on a number of recent occasions held that a newly announced constitutional rule need not be applied in cases where trials had already been commenced. The petition urges that we therefore are not bound by the rule of *Schooner Peggy* and should make our determination as to the retroactivity of *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).
>
> This assertion is incorrect. When the Supreme Court holds that a new rule of law should be applied only prospectively, it is itself delineating

---

[5]For other examples of cases on direct review at the time this Court rendered a significant decision enunciating a new legal standard or theory relevant to the case but held prospective in application only, *see Michigan v. Payne*, 412 U.S. 47, 36 L.Ed.2d 736, 93 S.Ct. 1966 (1973); *Williams v. State*, 401 U.S. 646, 29 L.Ed.2d 388, 91 S.Ct. 1148 (1971); *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed.2d 649, 94 S.Ct. 2750 (1974); *Robinson v. Neal*, 409 U.S. 505, 35 L.Ed.2d 29, 93 S.Ct. 876 (1973); *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966).

the substantive scope of that rule. As a conceptual matter, the Court is holding that its new rule is not the law with respect to cases that have already been initiated. In contrast, *when the Supreme Court announces a new rule of law after a district court has ruled but before a court of appeals has passed on a case, the court of appeals can place no such substantive limitation on the scope of the new rule. If the Supreme Court fails to limit the substantive scope of its new rule to purely prospective cases, the court of appeals as an inferior court must assume that the rule applies in all situations.* The policy factors that the Supreme Court relies on in determining whether its rules should have merely prospective effect are irrelevant, though they would not be if the court of appeals were determining whether to give retrospective effect to a new rule which it had itself announced.

Moreover, the Supreme Court has recently affirmed the viability of the *Schooner Peggy* doctrine. In *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281-82, 89 S.Ct. 518, 526, 21 L.Ed.2d 474 (1969), the Court held that an appellate court confronted with a change in the law "must apply the law in effect at the time it renders its decision," whether the change was constitutional, statutory, or judicial. Furthermore, this principle governs whether or not the new law is made specifically applicable to pending cases. See *Bradley v. Richmond School Board*, 416 U.S. 696, 711-16, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

Id. at 582 (emphasis added).

The clear understanding of practitioners before this Court is that the entry of an order by this Court which grants a writ of certiorari and remands the cause to the lower appellate court for reconsideration of the issues in light of an intervening Supreme Court case means exactly that: the law of the intervening case should be applied and considered when reanalyzing the case itself. This is the basis for the view set forth by Stern & Gressman, leading commentators on Supreme Court practice:

> The Court may grant a petition for certiorari and at the same time summarily reverse the judgment and remand the case for further proceedings. Such summary action occurs when the Court, or a majority thereof, is convinced that the decision below is so clearly erroneous as to make oral argument a waste of time. Most commonly this results because the Court believes the case to be clearly controlled by one or more of its own recent decisions . . . . [Footnote omitted.] And sometimes the Court will summarily vacate and remand in order to permit the lower court to reconsider its ruling in the light of a new Supreme Court decision. [Footnote omitted.]

Stern & Gressman, *Supreme Court Practice*, §5.12 at 362-63 (1978).

It follows, therefore, that the application of *Payton* by the district court to the cause herein was in accord with existing law on this issue and should be allowed to stand.

CONCLUSION

The decision of *Payton v. New York, supra,* was appropriately applied to the case sub judice by the District Court of Appeal of Florida, First District. There can be no rationale for attempting to apply *Payton* prospectively only. It was clearly foreshadowed by other decisions of state and federal cases, and is in accord with Fourth Amendment law of this nation.

It follows, therefore, that the Petition for Writ of Certiorari should be denied so that this cause may proceed in light of the ruling of the district court.

Respectfully submittted,

SIMON, SCHINDLER & TRIPP,
P. A.
1492 South Miami Avenue
Miami, Florida 33130
(305) 358-8611

By: _____
THEODORE L. TRIPP, JR.